No. 10-648

IN THE

# Supreme Court of the United States

FOUNDATION OF HUMAN UNDERSTANDING,
*Petitioner*,

v.

THE UNITED STATES,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit**

## REPLY BRIEF FOR THE PETITIONER

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## RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Rule 29.6 Corporate Disclosure Statement in the petition for writ of certiorari remains accurate.

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## REPLY BRIEF FOR THE PETITIONER

Petitioner Foundation of Human Understanding ("the Foundation") submits this Reply Brief to address new points raised in the brief in opposition ("Opp. Br.") filed by Respondent United States ("the Government"). Sup. Ct. R. 15.6.

While thoughtful and measured in tone, the Government's brief opposing allowance of the writ demonstrates in several important respects the need for this Court to bring clarity at this moment to the definition of "church" and, in particular, to the "associational" element that several courts have deemed important in meeting that definition. In advocating for the Federal Circuit's rule that church

status can be achieved and retained only if a regular congregation of individuals associate in communal worship on a regular basis, the Government does not quarrel with the Foundation's contentions that (1) such a requirement might disfavor certain religious groups; or (2) that the associational element might be satisfied through technological means such as the Internet. Opp. Br. 18-19. Rather, the Government merely contends that this case does not present an appropriate vehicle to address these issues, which it apparently recognizes are important ones. *Id.* However, because the Foundation's church status was taken away solely because of the Federal Circuit's conclusion that the Foundation's in-person, radio and Internet services did not involve communal worship and were hence not sufficiently "associational," these issues are squarely presented to this Court through the facts of this case.

## REASONS FOR GRANTING THE PETITION

### I. The Foundation Was Stripped of Church Status Only Because Its In-Person, Radio and Internet Services Were Deemed Insufficiently "Associational."

In its brief, the Government does not contest that, throughout the three tax years at issue, the Foundation had an independent legal existence; a recognized creed and form of religious worship; a distinct religious history; a religious literature of its own; an established place of worship (the Tall Timbers Ranch, in Selma, Oregon); an ecclesiastical government; a formal code of religious doctrine; and an organization of ordained ministers who were selected after completing a prescribed course of study. Opp. Br. 7-8. Nor does the Government contest that, during the years at issue, the Foundation conducted twenty-one

religious services during which Foundation ministers preached to groups of between ten and thirty individuals concerning religious issues. Pet. App. 56a, 64a, n.23.[1] It is also uncontested that the Foundation has thousands of followers who practice its meditation techniques, attend its services and seminars and read its publications, and that many of these followers have acknowledged the Foundation as their church. Pet. App. 59a-62a.

However, despite the fact that the Foundation clearly met nine of the fourteen factors applied by the Internal Review Service ("IRS") to determine whether a religious organization is a church, the Federal Circuit stripped the Foundation of church status only because the Foundation purportedly failed to conduct *regular* services during which a *regular* and cohesive group of congregants established a sufficiently interactive "religious fellowship through communal worship." Pet. App. 83a-84a. Because of this focus on communal worship amongst a regular congregation at regular services, the Federal Circuit's opinion is, despite the Government's urging to the contrary, an excellent vehicle for this Court to bring clarity to the meaning of the term "church" by interpreting any required associational element in a manner that is neither ethnocentric nor dismissive of modern technological advancements.

## II. The Ethnocentric Nature of the Federal Circuit's Requirement of Communal Worship Is Directly Presented.

In response to the Foundation's contention that the Federal Circuit's application of the associational test disfavors religions that do not place significant

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[1] The appendix to the petition is cited herein as "Pet. App."

emphasis on communal worship, the Government states merely that the issue is not presented here because the Foundation claimed throughout this litigation that it does in fact practice such worship. Opp. Br. 18. The Foundation respectfully disagrees.

Both by its requirement that religious services be regularly conducted before a regular and cohesive group of congregants and its requirement that the congregants develop a fellowship by worshipping together, the Federal Circuit's rule directly disadvantages nontraditional churches such as the Foundation. The frequency of the Foundation's in-person religious services, coupled with its radio and Internet services, was clearly adequate for the Foundation's own religious ministry, as demonstrated by the volume of letters that appears in the record, authored by a broad spectrum of individuals who participated in these services and accepted the Foundation as their church. Pet. App. 58a-61a. Thus, the Federal Circuit's holding that a greater number of services is required and that these services must be attended by a "regular" group of individuals, while couched in terms of providing an opportunity for congregants to associate, is more accurately viewed as a criticism of that portion of the Foundation's doctrine that permits it to establish the frequency and location of its meetings in ways that differ from the weekly traditions of Christian churches or Jewish synagogues. Pet. App. 83a-84a. In so doing, the Federal Circuit mistakes the familiar for the necessary. That the creeds of other established religious groups within the Judeo-Christian tradition may require religious services on a weekly basis at a specified location does not mean, as the Federal Circuit's opinion clearly implies, that such regularity is a *sine qua non* of church status.

By elevating two criteria of the IRS test, regular congregations and regular religious services to controlling status, the Federal Circuit disadvantages churches such as the Foundation that do not neatly fit the "traditional" mold. That this religious ethnocentrism might also adversely affect other religious groups not before this Court, including Eastern religions, that do not place substantial emphasis on regular religious services or communal worship, is not, as the Government appears to suggest, a reason not to grant the petition. Opp. Br. 18. If the issues raised by the Foundation in its petition were only about the facts of this case, then the case might not be worthy of this Court's review. However, where, as here, the effect of the Federal Circuit rule reaches beyond the parties in a manner that has the potential to threaten First Amendment religious liberty by disfavoring minority or nontraditional religious groups, that widespread effect supports allowance of the writ.

## III. The Federal Circuit's Failure to Consider Technological Advancements as Relevant to the Associational Test Is Also Directly Presented.

The same can be said for the Foundation's contention that the Federal Circuit misapplied the associational test by failing to afford any weight to the Foundation's interactive use of its radio and Internet transmissions. Without contesting the undeniable fact that churches increasingly are using the Internet and other modern technology to permit widely-dispersed congregants to conveniently attend their religious services, the Government dismisses the Foundation's claims as hypothetical and not presented by the facts of this case. Opp. Br. 19.

Again, the Foundation respectfully disagrees. This case involves the tax years between 1998 and 2000. During these years, before the Internet became a central feature in the lives of millions of people across the globe, the Foundation engaged in what might now appear to be a relatively limited use of the medium. During those years, the Foundation's followers could listen to the Foundation's services on the radio or through the Internet and then, if they wished to more actively participate in the services, they could call by telephone to speak and interact with the Foundation's clergy, giving the other congregants an opportunity to hear and reflect upon that interaction and to respond by calling in, as well. The Federal Circuit found that these communications between congregants and clergy that were heard by all of the other congregants listening to the religious service did not *as a matter of law* afford the Foundation's followers "the opportunity to interact and associate with each other in worship." Pet. App. 86a.

The Foundation asks this Court to review this blanket holding of the Federal Circuit, which minimizes the interactive possibilities of modern technology such as the Internet (or even radio and television). That a religious organization might utilize more advanced means of technological interaction in 2011 than were available in 1998 is not the issue. Rather, the issue concerns the use of modern technology in furtherance of interaction between congregants during a religious service. Contrary to the Government's view that the Foundation used the Internet "as a one-way broadcast medium," Opp. Br. 19, the evidence establishes that those participating in the Foundation's services were given the opportunity to interact by calling in while the services were being held.

The fact that the interactive use of modern technology may in the future become broader in its application, more frequent in its use, or vastly more effective should not dissuade this Court from granting this petition or persuade it to wait for another day, as the Government suggests. Opp. Br. 19. Rather, the burgeoning use by churches of technology to interact with followers and to permit followers to interact with each other underscores the importance of the issues directly presented herein and is a factor supporting this Court's review. *See* Bruce D. Collins, *The Definition of "Church" May Need to be Re-Examined in a Social Media World*, Inside Counsel Magazine, November 1, 2010 ("No doubt the associational test will itself be tested because it hinges on present-day understandings of cohesiveness and communal acts. Two things are happening via social media that will force courts to reconsider. First, the sheer number and frequency of virtual connections being made on a daily basis are changing the very concept of community. Second, technology will create more intimate forms of what is now called interactivity.").

## IV. The Foundation's Proposed Definition Does Not Conflate Churches with Other Religious Organizations.

The Foundation avers that a religious organization is a church if it "promulgates a religious ministry to a group of believers who * * * seek out the teachings of the organization and express or acknowledge a personal affiliation with its religious tenets." Pet. 27. The Government contends, in reliance on the Federal Circuit's view that "every religious organization has members who express an affiliation with the organization's tenets," that the Foundation's approach is

therefore "at odds with the generally accepted principle that Congress intended a more restrictive definition for a "church" than for a religious organization." Opp. Br. 17, quoting Pet. App. 82a.

However, the Foundation's definition is perfectly consistent with congressional intent because, contrary to the Federal Circuit's view, many religious organizations do *not* minister to a group of believers who accept their religious tenets as their own. For example, the IRS in its publication entitled "Tax Guide for Churches and Religious Organizations," states: "Religious organizations that are not churches typically include nondenominational ministries, interdenominational and ecumenical organizations, and other entities whose principal purpose is the study or advancement of religion." Internal Revenue Service Publication 1828 (11-2009). By this statement, the IRS recognizes that some religious organizations have purposes that do not include attending to the spiritual needs of individuals who accept the organization's religious tenets as their own. For example, a religious organization that seeks to advance religion generally or to educate by publishing the sacred texts of various religions does not act as a church in the sense that the Foundation does. Neither does a religious organization that seeks to foster cooperation and understanding between different denominations without advocating the views of any particular group.

The Foundation's proposed test thus does not conflate churches and religious organizations but rather recognizes the significant differences between the two. Here, it is uncontested that the Foundation possesses a recognized creed and form of religious worship; follows a formal code of religious doctrine,

has a religious literature of its own, and has an organization of ordained ministers who perform sacerdotal functions during religious services. Thousands of followers seek out the Foundation's religious ministry, accept the Foundation's teachings as their own, and consider the Foundation to be their church. This is a far cry from other religious organizations having far more limited goals. *See Chapman v. Comm'r*, 48 T.C. 358, 364 (1967) (interdenominational group of individuals who are affiliated with other churches and who spread general Christian principles through the provision of dental services is not a church). As a result, despite the Government's suggestion, the Foundation's test does not threaten the principle that all churches are religious organizations but not all religious organizations are churches.[2]

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[2] Relying upon the dissenting opinion in *Foundation of Human Understanding v. Comm'r*, 88 T.C. 1341, 1366 (1987), the Government suggests that Congress's decision to exempt churches from reporting requirements imposed upon other religious organizations was based upon its belief that a traditional church did not require governmental supervision because attendance by a regular congregation at regular meetings assured that the church's activities were carried out for a public purpose. Op. Br. 14. However, where the divination of Congressional intent is based on the musings of a dissenting judge in a lower court case and not upon statutory language or any source of legislative history, it is of dubious utility. *See Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) ("The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it." (Scalia, J. concurring in part and concurring in the judgment)).

## V. The Federal Circuit's Opinion Limits Church Status in a Manner Not Seen Before.

The Government views the Federal Circuit's placement of controlling weight upon the criteria of *regular* congregations attending *regular* services as being within the judicial mainstream. *See* Opp. Br. 18-19, citing *Lutheran Social Service v. United States*, 758 F.2d 1283 (8th Cir. 1985), and *Spiritual Outreach Soc'y v. Comm'r*, 927 F.2d 335 (8th Cir. 1991). However, in no reported case has a court ever denied church status to a religious organization which, like the Foundation, has a distinct religious history, creed, form of worship and religious literature and which ministers to thousands of individuals through ordained ministers both at in-person services and during radio and Internet services.

In fact, many of the reported cases in which church status has been denied involve so-called "family churches," that appear to have been organized principally for tax avoidance purposes. *See, e.g., United States v. Jeffries*, 854 F.2d 254, 258 (7th Cir. 1988) (one-person church with no followers, no services and no doctrinal code was not a church); *Church of Eternal Life & Liberty, Inc. v. Comm'r*, 86 T.C. 916, 921-25 (1986) (where the organization had only two members and its principal activities involved the distribution of political literature and the sale of merchandise, "church" status was denied); *Church of the Visible Intelligence that Governs the Universe v. United States*, 4 Cl. Ct. 55, 65 (1983) (without proof that organization extended beyond the founder's immediate family, it was not a church); *American Guidance Foundation, Inc. v. United States*, 490 F. Supp. 304, 306-07 (D.C. 1980) (where the organization

consisted of five family members who attended services at a relative's apartment and made no effort to extend membership beyond the family, "church" status was denied). Others involved organizations where any religious purpose was clearly subsidiary to non-religious activity. *See, e.g., VIA v. Comm'r*, T.C. Memo 1994-349, 68 T.C.M. (CCH) 212 (1994) (organization formed to promote "wellness" and spiritual growth through the latest discoveries in exercise and nutrition and which sold a nutritional food supplement was not a church); *Church of Spiritual Tech. v. United States*, 26 Cl. Ct. 713, 731 n. 36 (1992) (where primary purpose of organization was the archiving of documents, church status was not attained); *Lutheran Social Service v. United States*, 758 F.2d 1283, 1287 (8th Cir. 1985) (organization affiliated with the Lutheran Church the purpose of which was to provide social services to various needy individuals was not a church).

While the Government correctly states in its brief that some courts have stressed the importance of the presence of regular congregations and regularly-conducted services in determining whether a particular organization enjoys the benefits of church status (Opp. Br. 14-15), no court has previously given these factors the talismanic significance that the Federal Circuit has in this case.

## CONCLUSION

Despite the fact that the Foundation has thousands of followers who accept its religious tenets as their own, who participate in the Foundation's in-person, radio and Internet services, and who consider the Foundation to be their church, the Federal Circuit has decided that the Foundation is not a church under 29 U.S.C. § 170(b)(1)(A)(i) and 29 U.S.C.

§ 509(a)(1) merely because its in-person physical services are not "regular" enough. In addition to applying an unspecified measure of sufficient "regularity," the Federal Circuit disregarded entirely the Foundation's development of a widespread electronic ministry through its radio and Internet services, characterizing these services as mere one-way broadcasts without any associational elements.

The Federal Circuit's application of the associational test in this case is based upon the assumption that a church is not a church unless members physically meet with each other for the purpose of mutually strengthening their bond with the church's tenets. While this idea may be a familiar one that is consistent with historic practices of many traditional religions, it is also profoundly limiting, especially in light of technological advancements that are rapidly changing the ways in which individuals may receive religious teachings and interact with clergy and fellow worshippers alike.

This Court should grant the petition in this case so it can articulate a test for church status in a manner that affords due respect to the churchly attributes of both traditional and nontraditional religious organizations ministering to groups of followers who accept the organization's religious tenets as their own, but that avoids the tendency to view any "associational" requirement for church status in either an ethnocentric or technologically hidebound manner.

Respectfully submitted,

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